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Corp. and Truseal Technologies, Inc.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

STARLINE WINDOWS INC. et al.,

Plaintiffs,

vs.

QUANEX BUILDING PRODUCTS
CORP. et al.,

Defendants.

Case No. 3:15-CV-01282-L-WVG

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANTS' MOTION TO
COMPEL THE CONTINUED
DEPOSITION OF VITRUM
INDUSTRIES LTD. AND FOR
SANCTIONS**

*[Filed concurrently with Notice of
Motion; Declaration of Matthew A.
Macdonald; and Proposed Order]*

Judge: Hon. William V. Gallo
Date: None Set
Time: None Set
Dept.: 308

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Trial Date: None Set

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff Vitrum Industries Ltd.'s ("Vitrum") Rule 30(b)(6) witness, Mr. Thomas Martini, was unprepared to testify concerning six noticed topics. Mr. Martini acknowledged that he had done little or nothing to prepare and he was unable to answer even basic questions on these topics. Plaintiff's attempted to assert last minute objections to the noticed topics, then waived those objections and did not bring any motion for protective order to quash any topic. Defendants request that Vitrum be required to produce a prepared witness for deposition and pay all costs associated with that deposition, as well as attorney's fees for this motion.

I. FACTUAL BACKGROUND

This case concerns allegedly defective IGUs manufactured by Plaintiff Vitrum, incorporated into windows by Plaintiff Starline Windows Limited ("SWL"), and sold in the United States by Plaintiff Starline Windows Inc. ("SWI"). On April 20, 2016, Defendants served notices for the depositions of all three Plaintiffs. (Macdonald Decl. ¶ 2.) After the parties agreed that the depositions would take place May 18-20, amended deposition notices were served on April 28, 2016. (*Id.* ¶¶ 2-3, Ex. 1.) On May 17, 2016, at 6:21 p.m., the evening before the first deposition was set to begin in Washington State, Plaintiffs served written objections. (*Id.* ¶ 6, Ex. 3.) During the ensuing meet and confer, Plaintiffs' counsel stated that their witnesses would be prepared to testify on "all of Defendants' topics" and that the objections would be "non-issues." (*Id.* ¶ 5, Ex. 2.) Plaintiffs did not contact the Court or seek a protective order seeking to quash any of the Rule 30(b)(6) deposition topics. (*Id.* ¶ 6.)

At the May 20, 2016 deposition of Vitrum, Mr. Martini was not prepared to testify on Topics 30, 31, 35, 40, 46, and 56. The parties have engaged in an extensive meet and confer process which culminated on July 7, 2016, with an agreement that Vitrum would answer written deposition questions on five of the six topics at issue. (*See* Macdonald Decl. ¶¶ 7-17, Ex. 4-11.) To avoid another

1 deposition on Topic 56, Vitrum agreed to stipulate that it would not offer any
 2 testimony in this matter on Topic 56 beyond the answers provided by Mr. Martini at
 3 the deposition. (*Id.* ¶ 18, Ex. 12.) After Defense counsel circulated the draft
 4 stipulation, Plaintiffs retreated from their agreement by (1) imposing a limitation on
 5 the number of written questions for the topics, and (2) agreeing only that Vitrum
 6 would not offer testimony that “contradicted” answers given by Mr. Martini on
 7 Topic 56. (*Id.* ¶¶ 21-23, Exs. 13-15.).

8 **II. RULE 30(B)(6) REQUIRES THE DEPONENT TO EDUCATE AND**
 9 **PRODUCE A KNOWLEDGEABLE WITNESS**

10 Companies “have a duty to make a conscientious, good-faith effort to
 11 designate knowledgeable persons for Rule 30(b)(6) depositions and to prepare them
 12 to fully and unequivocally answer questions about the designated subject matter.” *Bd.*
 13 *of Trs. of Leland Stanford Junior Univ. v. Tyco Int’l Ltd.*, 253 F.R.D. 524, 526 (C.D.
 14 Cal. 2008). The corporation may “designate more than one deponent if necessary to
 15 respond to relevant areas of inquiry on the noticed topics.” *Id.* at 538–39. When a
 16 topic calls for detailed facts, “a Rule 30(b)(6) witness can be provided with a written
 17 summary of the same information in order to provide testimony on behalf the
 18 [entity], without requiring the witness to memorize voluminous facts of which he or
 19 she has no personal knowledge.” *Ballentine v. Las Vegas Metro. Police Dep’t*, No.
 20 14-cv-01584, 2016 WL 3636917, at *2 (D. Nev. July 5, 2016).

21 If it “becomes apparent during the deposition that the designee produced is
 22 unable to respond to relevant areas of inquiry, the responding party has a duty to
 23 designate an additional knowledgeable deponent.” *Great Am. Ins. Co of N.Y. v.*
 24 *Vegas Constr. Co.*, 251 F.R.D. 534, 540 (D. Nev. 2008). If a corporation does not
 25 do so, an appropriate remedy is to grant a motion to compel a new 30(b)(6)
 26 deposition on the topics on which the first witness was unprepared, with attorney’s
 27 fees and costs borne by the designating party. *See, e.g., Pioneer Drive, LLC v.*
 28 *Nissan Diesel Am., Inc.*, 262 F.R.D. 552, 560 (D. Mont. 2009) (ordering, as

1 sanctions for producing unprepared witness, a new Rule 30(b)(6) deposition; travel
 2 costs, expenses, and attorney's fees for the new deposition; and costs and attorney's
 3 fees in bringing motion to compel).

4 **III. VITRUM DID NOT MOVE FOR A PROTECTIVE ORDER TO**
 5 **QUASH ANY OF THE RULE 30(B)(6) DEPOSITION TOPICS**

6 "The proper procedure to object to a Rule 30(b)(6) deposition notice is not to
 7 serve objections on the opposing party, but to move for a protective order." *Beach*
 8 *Mart, Inc. v. L & L Wings, Inc.*, 302 F.R.D. 396, 406 (E.D.N.C. 2014). A corporate
 9 deponent cannot simply make "objections and then provide a witness that will
 10 testify only within the scope of its objections." *Id.* If conferring with opposing
 11 counsel does not resolve the objections, then moving for a protective order under
 12 Rule 26(c) is the only reasonable option. Fed. R. Civ. P. 26(c).

13 **IV. VITRUM'S CORPORATE DESIGNEE WAS UNPREPARED TO**
 14 **TESTIFY CONCERNING TOPICS 30, 31, 35, 40, 46, AND 56**

15 **Topic 30: The terms of the contracts for the sale of the SUBJECT IGUs**
 16 **between YOU and STARLINE CANADA or STARLINE USA.**

17 **Topic 31: The terms of all warranties YOU provided with respect to the**
 18 **SUBJECT IGUs.**

19 With respect to these two related topics, Mr. Martini was not prepared to
 20 answer questions about important terms in contracts between Vitrum and Starline.
 21 As to the topic of warranties, Mr. Martini testified that Vitrum's "standard
 22 warranty" applied to its sales to Starline, but he could not state the terms of the
 23 warranty, or verify whether a form downloaded from Vitrum's website was its
 24 standard warranty. He had not even reviewed Vitrum's standard warranty in
 25 preparation for the deposition. (Macdonald Decl. Ex.16 at 223:2–15, 226:22–229:9,
 26 235:20–236:17.) Similarly, Mr. Martini could not confirm whether Vitrum's terms
 27 of sale to Starline limited the remedies that Starline could pursue against Vitrum if
 28 the subject IGUs proved defective. (*See id.* Ex. 16 at 228:3-20.)

Topic 35: The monthly volume of IGUs YOU manufactured using
TRUSEAL PIB SEALANT from 1999-2012.

1 Mr. Martini testified that Vitrum maintained monthly production reports, but
 2 that he had not reviewed those reports and was unable to estimate Vitrum's total
 3 IGU production during the relevant years. (Macdonald Decl. Ex. 16 at 72:1–74:25,
 4 78:7–21.) Plaintiffs argue that it was unreasonable for Mr. Martini to calculate and
 5 then memorize the requested information, and that Defendants should have provided
 6 Mr. Martini with the documents he needed. (*Id.* Ex. 6 at 2.) This argument turns
 7 Rule 30(b)(6) on its head. The rule requires the *corporation* to identify the relevant
 8 documents from its records and use those documents to *educate* a prepared witness
 9 who can state the corporation's knowledge on the topic.

10 Moreover, a prepared Rule 30(b)(6) witness is entitled to bring documents
 11 and summaries to the deposition to aid in testifying, rendering “memorization”
 12 unnecessary. And while Vitrum suggests that Defendants should have presented
 13 Mr. Martini with documentation showing Vitrum's production, that was impossible
 14 because such documents, while requested in discovery, had not been produced by
 15 Vitrum. (*Id.* ¶ 25.)

16 **Topic 40: The identity, substance, date, and records of complaints YOU**
 17 **received concerning IGUs or windows at the SUBJECT PROPERTIES**
 18 **(whether or not such complaints concern the performance of TRUSEAL PIB**
 19 **SEALANT).**

19 Mr. Martini was unable to identify the date on which Vitrum first learned of
 20 complaints about PIB migration at twelve out of the thirteen properties for which
 21 Plaintiffs then sought damages. (*Id.* Ex. 16 at 176:14–180:20.) Nor could he testify
 22 whether Vitrum had records that would answer that question, admitting that he had
 23 not talked to individuals at Vitrum likely to possess this information. (*Id.*)

24 **Topic 46: The amount and composition of costs YOU incurred in**
 25 **connection with the replacement of IGUs at any of the SUBJECT**
 26 **PROPERTIES.**

27 Mr. Martini testified that he had done nothing to prepare for this topic other
 28 than to review a single invoice that Vitrum sent to Starline in 2016—two years after

1 the IGU replacements had been made—for the purchase of replacement IGUs. (*Id.*
 2 at 243:5–10.) Mr. Martini was unable to explain what portion of the invoice price
 3 reflected profit for Vitrum; nor could he testify concerning Vitrum’s materials costs
 4 or labor costs without reference to documents that had not been produced to
 5 Defendants. (*Id.* at 239:22–246:4; *id.* Ex. ¶ 25.)

6 **Topic 56: The exchange of purchase orders, order confirmations, and**
 7 **invoices between YOU and DEFENDANTS for the purchase and sale of**
 8 **TRUSEAL PIB SEALANT.**

9 Mr. Martini testified that he did not review purchase orders, order
 10 confirmations, or invoices exchanged between the parties, and could not answer
 11 basic questions on this topic. (*See id.* Ex. X at 164:20–173:11.)

12 **V. CONCLUSION**

13 Defendants request an order that Vitrum produce a Rule 30(b)(6) witness on
 14 the six topics for which Mr. Martini was unprepared and bear all costs of the
 15 renewed deposition, including court reporting fees, attorney’s fees, and travel
 16 expenses, as well as fees incurred in bringing this motion.

17 DATED: July 15, 2016

MUNGER, TOLLES & OLSON LLP

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 19
 20 By: /s/ Matthew A. Macdonald

MATTHEW A. MACDONALD

21 Attorneys for Quanex Building Products
 22 Corporation and Truseal Technologies, Inc.
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